Petition

81-2050

No. _____

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In The

Supreme Court of the United States

October Term, 1981

BURLINGTON NORTHERN, INC.,

Petitioner,

vs.

WAYNE T. WILSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Eighth Circuit Court of Appeals erred in holding that in an action brought under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, the submission to the jury of the issue of the contributory negligence of a railroad employee was prejudicial rather than harmless error where the jury returned a verdict in favor of the railroad.

2. Whether the Eighth Circuit Court of Appeals erred in holding that the evidence in an action brought under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, was insufficient to justify the submission of the issue of the contributory negligence of the injured railroad employee to the jury.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Burlington Northern Inc.[1], the petitioner herein, prays that a Writ of Certiorari issue to review the decree of the United States Court of Appeals for the Eighth Circuit

[1]In compliance with Supreme Court Rule 28(1), Burlington Northern's parent, subsidiaries and affiliates have been included in a footnote to the Appearance of Richard A. Knudsen.

entered in the above-entitled case on February 8, 1982; and the order of the Eighth Circuit denying Burlington Northern's Petition for Rehearing En Banc entered on March 26, 1982.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as: *Wilson v. Burlington Northern Inc.*, -- F. 2d — (8th Cir. 1982). A copy of the Eighth Circuit's opinion has been included in the Appendix (A. at App. 1-10).[2] The Eighth Circuit denied Burlington Northern's Petition for Rehearing En Banc, without opinion on March 26, 1982. A copy of the Eighth Circuit Order has been included in the Appendix (A. at App. 11). The United States District Court for the District of Nebraska denied the Respondent's Motion for a New Trial without opinion. The Judgment of the United States District Court for the District of Nebraska has been included in the Appendix (A. at App. 12). The District Court's Order denying the Respondent's Motion for a New Trial has also been included in the Appendix (A. at App. 13).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit filed its opinion and decree on February 8, 1982 (A. at App. 1-10). On March 26, 1982, the Eighth Circuit

[2]In this Petition, references to the Appendix will be abbreviated as "A" followed by a page number.

denied the Burlington Northern's Petition for Rehearing En Banc (A. at App. 11). The jurisdiction of this Court is invoked under the provisions of Title 28, Section 2101 (c) of the United States Code.

STATUTES INVOLVED

The statutes involved in the present case are Sections 51 and 53 of Title 45 of the United States Code.

Title 45, Section 51 provides:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such comerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such com-

merce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefit of this chapter.

45 U. S. C. § 51.

Title 45, Section 53 provides:

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U. S. C. § 53.

STATEMENT OF THE CASE

Wayne T. Wilson [hereinafter referred to as "Respondent" or "Wilson"] brought suit under the provisions of the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.* [hereinafter referred to as "FELA"], against Burlington Northern Inc., [hereinafter referred to as "Petitioner" or "Burlington Northern"] in the United States District Court for the District of Nebraska. Following trial to a jury, and a verdict in favor of Burlington North-

ern the trial court entered judgment dismissing Wilson's case. Wilson's motion for a new trial was denied (A. at App. 13), and Wilson appealed to the Eighth Circuit. On February 8, 1982, the United States Court of Appeals for the Eighth Circuit entered its decree reversing the trial court's denial of Wilson's motion for a new trial, and remanding the case for a new trial. On March 26, 1982, the Eighth Circuit denied Burlington Northern's Petition for Rehearing En Banc.

Burlington Northern is a common carrier by railroad engaged in interstate commerce which operates and maintains facilities in several states, including the State of Nebraska. At the time of the incidents Wilson was employed by Burlington Northern as a carman. As a carman Wilson was engaged in the repair of railroad cars, including covered hopper cars. Wilson's duties included welding, lifting and carrying knuckles and lifting sledgehammers, bars, chains, and metal portions of railroad cars. Wilson also had occasion to work underneath railroad cars.

At the time of the incidents Wilson was engaged in the repair of airslide hopper cars. The first incident occurred on February 6, 1978, when Wilson and three other Burlington Northern employees were carrying an airslide pan that attaches to the bottom of each hopper car. The airslide pan is approximately fifteen feet long, eighteen inches wide, and weighs approximately 290 pounds. At the time of the incident, the pans were installed manually; although a specially designed hydraulic jack was available for the employee's use. Moreover, Wilson testified that he used the jack to install air pans before the incident.

On the date of the initial incident, Wilson and three other employees carried an airslide pan from a storage area to a hopper car. The hopper car was on stands, with the bottom of the car being elevated approximately four feet off the ground. While lifting the pan into place, Wilson felt a pain in his back and leg. The evidence adduced at trial indicated that the hydraulic jack was available for Wilson's use; that Wilson could have requested additional help in moving the airslide pan, but did not do so; and that Wilson could have requested to be excused from performing the job if he felt that it was beyond his capabilities, but Wilson did not request to be relieved. Wilson testified that he had lifted airslide pans before, knew their weight, and how to lift them under the conditions prevailing at the time of the accident. Wilson also testified that he did not feel that the airslide pan was too much weight, or that he did not have the physical capacity to lift the airslide pan.

The second incident occurred on February 24, 1978, when Wilson was asked by another employee to determine what was wrong with a butterfly catch located on the bottom of a hopper car. Wilson crawled under the car, hit the butterfly catch with a hammer, crawled out and as he stood up he felt a pain in his back and leg. Wilson had no trouble getting under the car, but felt the pain as he stood up. Wilson was not carrying or lifting while standing, nor did Wilson twist or slip when he stood.

The trial court submitted the issue of Wilson's contributory negligence to the jury, and the jury returned a verdict in favor of Burlington Northern. The trial court

denied Wilson's motion for a new trial, and the Eighth Circuit reversed and remanded for a new trial.

REASONS FOR GRANTING THIS WRIT

I.

The Eighth Circuit erred in holding that the submission to the jury of the issue of the contributory negligence of a railroad employee was prejudicial error where the jury returned a verdict in favor of the railroad.

In order to recover damages in an FELA action, the injured employee must prove negligence, causation and damages. The contributory negligence of the injured employee relates only to the issue of damages. *See* 45 U. S. C. § 53. In order to return a general verdict for the railroad, the jury *must* have found that the railroad was not negligent, or that the railroad's negligence did not cause or contribute to the injury.

Rogers v. Southern Pacific Co., 172 Cal. App. 2d 493, 342 P. 2d 258 (1959), involved a wrongful death claim under the FELA. The plaintiff appealed from a jury verdict in favor of the defendant railroad. On appeal the plaintiff argued, *inter alia*, that the trial court erred in submitting contributory negligence to the jury. The court held that any error in the contributory negligence instruction was harmless:

> The jury was properly instructed that under the Federal Employers' Liability Act the contributory neg-

> ligence of an employee is not a complete defense but merely a ground for diminishing the amount of recovery. (*Springer v. Southern Pac. Co.*, 145 Cal. App. 2d 640 [302 P. 2d 872]; 45 U. S. C. A. § 53.) In order to find its verdict for defendant under these instructions the jury must have found that defendant was guilty of no negligence which contributed as a proximate cause of decedent's death. *Under such circumstances any error in the instructions or the admission of evidence relating solely to the decedent's contributory negligence cannot have been prejudicial to appellant.*

Id. at 497, 231 P. 2d at 261 (emphasis added).

The *Rogers* Opinion relies upon the Eighth Circuit decision of *Tracy v. Terminal R. Assn. of St. Louis*, 170 F. 2d 635, 639-640 (8th Cir. 1948) wherein the Eighth Circuit had before it an appeal by the plaintiff from a defendant's verdict, alleging error in excluding evidence relating to the plaintiff's actions. The Eighth Circuit stated the plaintiff's acts concerned whether he was contributorily negligent and had no direct bearing on the question of defendant's liability since contributory negligence under FELA may be considered only on the question of the amount of damages to be awarded. It said:

> The jury having determined this issue in favor of defendant, then clearly the question of decedent's contributory negligence became immaterial, as did also any testimony going to the extent of decedent's injuries or the amount of damages recoverable. We need not therefore determine whether the court may in some instances have committed technical error in excluding any of this evidence as such error could not, in view of the record, have been prejudicial.

Id. at 640.

In its Opinion herein, the Eighth Circuit rejected the rule announced in *Rogers v. Southern Pacific Co., supra*, stating that:

> "The better rule is the one followed by the federal courts; that is, when there is no evidence from which a jury could reasonably find a lack of due care by the plaintiff, it is reversible error to submit the issue of contributory negligence to the jury. E. g., *Paluch v. Erie Lackawanna R. R. Co., supra*, 387 F. 2d at 999; *Morran v. Pennsylvania R. R. Co., supra*, 306 F. 2d at 403-404."

Wilson v. Burlington Northern Inc., supra, — F. 2d at —.

However, the federal cases cited in support of this rule do not support the proposition stated, nor are they contrary to the *Rogers* case and the rationale of the Eighth Circuit in the *Tracy* case. The federal cases cited by the Eighth Circuit as support involved verdicts for the plaintiff, rather than for the defendant, and the plaintiff in those cases complained that the verdicts were too low because of the contributory negligence instruction. This Petitioner finds no fault with the rule finding it prejudicial error to submit contributory negligence when there is a plaintiff's verdict and there is no evidence from which a jury could reasonably find a lack of due care by the plaintiff. In such cases, the erroneous submission of contributory negligence may improperly affect a jury determination of damages. However, the rationale of *Rogers* and *Tracy*—that a jury determination of no liability is made *before* consideration of the effect of any contributory negligence on damages—is not applicable to the cases cited by the Eighth Circuit. The rationale of *Rogers* and *Tracy* applies only where there is a defendant's verdict.

In addition, the Eighth Circuit's Opinion in the instant case states that there is a risk that the jury might fail to understand the statutory comparative negligence scheme, and that when a general verdict is used a court cannot ascertain whether or not the jury applied the applicable law in deciding to award no damages. It also said that because of this risk of confusion it could not say that Wilson was not prejudiced by the unjustified contributory negligence instruction. However, Instruction 13 (A. at App. 14) stated the federal law that contributory negligence is not a bar, but that damages shall be diminished in proportion to the amount of negligence attributable to the employee. Instruction 20 (A. at App. 14-15) took the jury step-by-step through the verdict process stating that only after it finds that the defendant is negligent and that the defendant's negligence caused the injury and that the plaintiff was contributorily negligent should it then diminish the damages in proportion to the amount of negligence attributable to the plaintiff. An appellate court will assume that the jury understood and followed the plain and clear instructions of the trial court. *Barnes v. Omark Industries Inc.*, 369 F. 2d 4 (8th Cir. 1966); *Ralston Purina Co. v. Parsons Feed & Farm Supply Inc.*, 364 F. 2d 57 (8th Cir. 1966); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE, § 2558 at 668 (1971). *E. g., Yeargain v. National Dairy Products Corp.*, 317 F. 2d 779 (8th Cir. 1963). The instructions here are so clear that any risk of confusion by the jury can be no more than supposition or conjecture. An assumption of jury confusion should not be made and, in fact, the law is that the assumption is to the contrary. Contributory negligence is clearly explained to be a damages issue, not a liability issue.

The result reached by the Eighth Circuit in *Wilson* clearly conflicts with the result reached by the California Appellate Court in *Rogers v. Southern Pacific Co., supra,* and the rationale of the Eighth Circuit decision of *Tracy v. Terminal R. Assn. of St. Louis, supra.* Since jurisdiction under the FELA is concurrent, 45 U. S. C. § 56, this Court should grant the Burlington Northern's Petition for Certiorari to insure the uniform and consistent application of the contributory negligence provisions of the FELA in state and federal courts.

II.

The Eighth Circuit erred in holding that the evidence in an action brought under the Federal Employers' Liability Act was insufficient to justify the submission of the contributory negligence of the Respondent to the jury.

The decision below impermissibly deprives Burlington Northern of its right to a jury determination of the issue of Wilson's contributory negligence. The trial court submitted the issue of Wilson's contributory negligence to the jury; the jury returned a general verdict in favor of Burlington Northern; and the Eighth Circuit, after weighing the evidence, substituted its judgment for that of the jury and determined that Wilson was not contributorily negligent.

This Court has not determined the issue of the quantum of proof necessary to present a jury question under Section 3 of the FELA. However, in cases involving the quantum of proof necessary to present a jury question under Section 1 of the FELA, this Court has granted certior-

ari to review the decisions of lower federal and state courts that impermissibly interjected appellate courts into the realm of the jury. The Eighth Circuit's actions in the present case are clearly in conflict with prior decisions of this Court involving the quantum of proof necessary to present a jury question under Section 1 of the FELA. For that reason, and because this Court has never established the quantum of proof necessary to present a jury question on the issue of contributory negligence, Burlington Northern's Petition for a Writ of Certiorari should be granted.

In *Rogers v. Missouri Pacific Railroad*, 352 U. S. 500 (1957), discussing the evidence sufficient to present a jury question under Section 1 of the FELA, the Court held that:

> [T]he test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.

Id. at 506 (footnote omitted). *E. g., Webb v. Illinois Central Railroad*, 352 U. S 512 (1957). The same standard of causation, whether the employee's negligence played any part in the injuries sustained, applies to employer claims of contributory negligence. *Dixon v. Penn Central Co.*, 481 F. 2d 833 (6th Cir. 1973); *Ganotis v. New York Central Railroad*, 342 F. 2d 767 (6th Cir. 1965) (per curiam).

> [I]n these [FELA] cases, the sufficiency of the evidence to take the issue of contributory negligence to the jury is to be tested by the same standards that are used to test the sufficiency of plaintiff's evidence on the issues of negligence and proximate cause.

Mumma v. Reading Co., 247 F. Supp. 252, 254 (E. D. Pa. 1965). *E. g., Daulton v. Southern Pacific Co.*, 237 F. 2d 710 (9th Cir. 1956), *cert. denied*, 352 U. S. 1005 (1957).

In FELA cases, it is an undue invasion of the jury's function for an appellate court to weight conflicting evidence and arrive at a conclusion different from the conclusion reached by the jury. *Lavender v. Kurn*, 327 U. S. 645 (1946) (reinstating jury verdict for FELA plaintiff).

An examination of the opinion herein results in the conclusion that the Eighth Circuit substituted its judgment for that of the jury. Whether Wilson was contributorily negligent; whether Burlington Northern's allegations were "not consistent" with the perceived realities of the workplace; whether free choice was involved; whether use of the available jack was "implausible;" and whether Wilson could have asked for additional help were all jury questions. By interjecting itself into the jury's realm, the Eighth Circuit has taken a position clearly inconsistent with the rules announced by the Supreme Court under Section 1 of the FELA and with the Eighth Circuit's prior decision in *Chicago, Rock Island & Pacific R. R. v. Melcher*, 333 F. 2d 996 (8th Cir. 1964):

> *Under the Act, the right of the jury to pass upon the question of fault and causality must be most liberally viewed. And for purposes of its right to pass on these elements, the jury's power to engage in inferences must be recognized as being significantly broader than in common law negligence actions. . . . The scope of that power extends materially beyond the traditional concept of speculation applied in common law actions.* In the liberality entitled to be exercised as to probative relevance and required to be recognized as to inferences thereon, it is only necessary that the jury's conclusion be one which is not outside the possibility of reason on the facts and circumstances shown.

Id. at 999 (emphasis added) (citations omitted). *See Dennis v. Denver & Rio Grande Western Railroad, supra*, 375

U. S. 208 (1963); *Basham v. Pennsylvania Railroad, supra,* 372 U. S. 699 (1963); *Gallick v. Baltimore & Ohio Railroad, supra,* 372 U. S. 108 (1963); *Rogers v. Missouri Pacific Railroad, supra,* 352 U. S. 500 (1957); *Webb v. Illinois Central Railroad,* 352 U. S. 512 (1957); *Lavender v. Kurn,* 327 U. S. 645 (1946). *See e. g., Davis v. Burlington Northern Inc.,* 541 F. 2d 182, 185 (8th Cir. 1976), *cert. denied,* 429 U. S. 1002 (1976); *Panger v. Duluth, Winnipeg & Pacific Railway Co.,* 490 F. 2d 1112 (8th Cir. 1974).

Moreover, Congressional policy mandates that the jury be the final arbitrator of factual disputes:

> The decisions of this Court after the 1939 amendments [to the FELA] teach that the *Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases* where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. *Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination.*

Rogers v. Missouri Pacific R. R., 352 U. S. at 510 (emphasis added). The Supreme Court's comments in *Rogers v. Missouri Pacific Railroad, supra,* apply with equal force to the present case.

Burlington Northern illustrates the problem by examining the Eighth Circuit's opinion in quotes with a Comment following to show the factual conclusions in the Opinion are either not supported by any evidence, or that there is evidence which shows just to the contrary, but unquestionably establishes that there was no error by the trial court in submitting contributory negligence to the jury:

1. "The Railroad's argument simply is not consistent with the realities of the workplace. Wilson was asked to carry the pan. As was the custom at Burlington Northern, he complied with the request. When a man's assistance is needed and asked for, he helps—there is no choice involved."

COMMENT: There is no evidence concerning the realities of the workplace and, in fact, Wilson testified that he knew if he could not do the job he could have requested not to do it.

2. "Moreover, the argument that Wilson could have used the jack is implausible."

COMMENT: In fact, Wilson testified he knew the jack was available and could have been used on the date of the injury.

3. "Wilson could not reasonably have been expected to ask that men be pulled off other jobs to help carry the pan when four men were already available. . . ."

COMMENT: In fact, the sole evidence on this point is the unrebutted testimony of the foreman stating that if an employee requests extra help he has such a right and the foreman will give him more help. Additionally, the Court in its Opinion recognized this practice when the other employees asked Wilson to help, and the Court said: "When a man's assistance is needed and asked for, he helps—there is no choice involved."

4. "Similarly, Wilson did not fail to exercise due care when he was reinjured on February [24], 1978. The railroad's doctor had certified that Wilson was ready to begin working again on February 22. Moreover, the doctor's instructions regarding restricting work activity apparently were nothing more than a perfunctory caution to avoid heavy lifting or assuming other positions that could reinjure Wilson's back and leg. Apparently, the doctor placed no specific restrictions on Wilson's work activity. Under these cir-

> cumstances, it was hardly a contravention of the doctor's work restrictions—if they can be considered restrictions at all—for a railroad worker who regularly engages in vigorous manual labor to step under a car and hammer a piece of equipment back into place."
>
> COMMENT: Wilson did not contend or even argue in his brief in the Eighth Circuit that there was error in submitting contributory negligence to the jury in the second accident, dated February 24, 1978.

Burlington Northern's Petition for Certiorari should be granted in order to resolve the questions created by the panel in its opinion below.

The uniform and consistent application of the FELA requires review of the issues raised by the Eighth Circuit's opinion. Application of the opinion would require federal district courts in this circuit to review the evidence of contributory negligence; and then determine whether the claims are "implausible," not "reasonable," or "not consistent" with the "realities" of the workplace, before submitting the issue to the jury. Such a result, besides being impossible to apply, impermissibly interjects the trial court into the province of the jury, which is contrary to the Congressional policy making the jury the final arbitrator of factual disputes as well as contrary to the law developed in the aforementioned cases under Section 1 and Section 3 of the FELA. Thus, this Court should grant the Burlington Northern's Petition for Certiorari to review the decision of the court below.

III.

This case presents serious questions of federal law that have not been addressed by this Court re-

garding the application of the contributory negligence provisions of Section 3 of the Federal Employers' Liability Act.

This case presents serious questions regarding the uniform interpretation and application of the contributory negligence defense provided by section 3 of the FELA. The *Annual Report of the Director of the Administrative Office of the United States Courts* indicates that 1990 FELA cases were filed in federal district courts during the year ending June 30, 1980. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Page A-18 Table C-3 (1980) [hereinafter cited as 1980 ANNUAL REPORT]. During the years ending June 30, 1979 and June 30, 1978 some 1540 and 1494 FELA cases were filed respectively. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 60 (1979). The number of FELA cases increased 3.1% from June 30, 1978 to June 30, 1979; and 29% from June 30, 1979 to June 30, 1980. On a district-by-district basis for the year ending June 30, 1980 the four districts in which the greatest number of FELA cases were filed were: (1) the Eastern District of Pennsylvania (349 cases); (2) *the District of Nebraska (127 cases)*; (3) the Central District of California (118 cases); and (4) the Eastern District of New York (104 cases). 1980 ANNUAL REPORT, *supra*, at Page A-18 (Table C-3). With regard to the District of Nebraska, FELA cases comprised 21% of the private civil cases filed for the year ending June 30, 1980. *Id.*

Since jurisdiction under the FELA is concurrent with state courts, 45 U. S. C. § 56, the foregoing data regarding the number of FELA cases filed understates the total number of FELA cases filed. The foregoing data does indi-

cate, however, the importance of questions regarding the proper and uniform interpretation and application of the FELA. Under the FELA, an employee's contributory negligence does not bar recovery, but does diminish the amount of any recovery in proportion to the amount of the employee's contributory negligence. 45 U. S. C. § 53. Thus, the question of the quantum of proof necessary to raise a jury question regarding the contributory negligence of an FELA plaintiff is important to the uniform administration of the FELA in state and federal courts. Moreover, since this Court has never addressed the issue of the quantum of proof necessary to present a jury question under Section 3 of the FELA, certiorari should be granted to resolve the questions raised by the opinion below.

CONCLUSION

For the foregoing reasons, Petitioner, Burlington Northern Inc., respectfully submits that this Court grant its Petition for a Writ of Certiorari to review the decision of the Court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As one of the attorneys for the Petitioner herein, I do hereby certify that pursuant to Rule 28 (3) of the Rules of the Supreme Court of the United States, I caused three copies of the Petitioner's Petition for a Writ of Certiorari to be served upon Patrick J. Foley, DeParcq, Anderson, Perl, Hunegs & Rudquist, 608 Building, Suite 565, 608 Second Avenue South, Minneapolis, Minnesota, 55402, and John J. Higgins, Suite 650, Continental Building, Omaha, Nebraska, 68102, by United States Mail, postage prepaid, on this 5th day of May, 1982.

Original Signed By
RICHARD A. KNUDSEN

Richard A. Knudsen

Appendix

APPENDIX

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 81-1429

Wayne T. Wilson,

Appellant,

v.

Burlington Northern, Inc., a corporation,

Appellee.

Appeal from the United States District Court
for the District of Nebraska.

Submitted: October 16, 1981

Filed: February 8, 1982

Before HEANEY and STEPHENSON, Circuit Judges, and DAVIES,* Senior District Judge.

HEANEY, Circuit Judge.

Plaintiff Wayne Wilson was injured while employed by Burlington Northern, Inc. He brought suit against the railroad under the Federal Employer's Liability Act (F.E.L.A.), 45 U.S.C. § 51 *et seq.* After a trial, the jury found that the plaintiff was not entitled to recover damages. The plaintiff appeals from the district court's denial of his motion for a new trial. We reverse and remand for a new trial.

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*The Honorable RONALD N. DAVIES, United States Senior District Judge, for the District of North Dakota, sitting by designation.

I. *FACTS.*

Wilson was injured while helping carry a large pan that attaches to a railroad hopper car. The pan is approximately fifteen feet long, eighteen inches wide and weighs about 290 pounds. At the time Wilson was injured on February 6, 1978, the pans were installed manually. Four persons carried each pan approximately twenty feet from a storage area to the hopper car. The car at that time would be on stands, with the bottom standing approximately four feet above the ground. The men would bend over and carry the pan beneath the car, where they would then lift up the pan and attach it to the car.

Prior to January, 1977, the pans had been installed by using a mechanical jack which required no manual lifting. In January, 1977, however, the railroad's employees stopped using the jack. At the time of his injury, Wilson was of the understanding that the jack could not be used to install pans. The railroad contends that it did not order the use of the jack terminated and that "the jack was available and could be used on the date of the injury." The fact remains undisputed, however, that regardless of who ordered the use of the jack to be discontinued, for approximately one year prior to the injury, defendant's employees had not used the jack to install the pans.

On the day of the injury, Wilson was not assigned the specific task of installing pans in hopper cars. Instead, a group of men with whom Wilson was working asked him to assist them in carrying a pan. As was the custom at the Burlington Northern, Wilson complied with the request to aid others asking for additional help. While lifting the pan into place, Wilson felt a pain in his back and leg.

Wilson reported the injury to the company physician and underwent therapy for a brief period. Thereafter, the company doctor certified that Wilson was "able to work as a welder on February 22, 1978." The doctor did not instruct Wilson to restrict his activities, other than cautioning him to avoid "heavy lifting." On February 24, 1978, Wilson was again working with another man on a hopper car. When asked for assistance, Wilson got down on his hands and knees to inspect the equipment on the bottom of the car. He hammered a chute into alignment, and when he stood up, he again experienced pain in his back and leg.

Wilson underwent surgery for his injury, and left his job with the railroad. He has never been approved by a physician to return to work for the railroad and has not done so.

Wilson sued the Burlington Northern in two counts under F.E.L.A. for negligently causing his injury. Wilson's first cause of action alleged that the railroad's negligence caused his initial injury on February 6, 1978. The second cause of action alleged that the Burlington Northern negligently caused the plaintiff's reinjury to his back and leg on February 28, 1978. After trial, the jury returned a general verdict against the plaintiff. The district court entered judgment for the defendant and denied the plaintiff's motion for a new trial. The plaintiff now appeals to this Court.

II. *DISCUSSION.*

The plaintiff contends that the district court erred in submitting the issue of contributory negligence to the

jury. In a F.E.L.A. case, the burden of proving contributory negligence is, of course, on the railroad. *E. g., Paluch v. Erie Lackawanna Railroad Co.*, 387 F. 2d 996, 999 (3d Cir. 1968). A defendant is entitled to a contributory negligence instruction if there is any evidence to support that theory. *E. g., Dixon v. Penn Central Co.*, 481 F. 2d 833, 835 (6th Cir. 1973). But if no evidence is presented from which a jury could properly find a lack of due care by a plaintiff, then it is generally fundamental error for the district court to give a contributory negligence instruction, and a plaintiff is entitled to a new trial. *Paluch v. Erie Lackawanna Railroad Co., supra*, 387 F. 2d at 999; *Morran v. Pennsylvania Railroad Co.*, 321 F. 2d 402, 403 (3d Cir. 1963).

The defendant contends here that there was sufficient evidence of plaintiff's lack of due care to justify the district court's contributory negligence instruction.[1] The

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[1]The district court's instructions regarding contributory negligence were as follows:

INSTRUCTION NO. 12

In addition to denying that any negligence of the dedefendant caused any injury or damage to the plaintiff with respect to each of plaintiff's causes of action, the defendant alleges, as a further defense, that some contributory negligence on the part of plaintiff himself was a cause of any injuries and consequent damages plaintiff may have sustained.

Contributory negligence is fault on the part of a person injured, which cooperates in some degree with the negligence of another, and so helps to bring about the injury. In the present case, with respect to plaintiff's first cause of action, the defendant alleges that the plaintiff,

(Continued on following page)

(Continued from previous page)

Wayne Wilson, was guilty of contributory negligence in one or more of the following particulars:

1) In failing to exercise reasonable care and precaution for his own safety and well-being;

2) In failing to request any additional physical help necessary in the performance of plaintiff's assigned duties.

With respect to the plaintiff's second cause of action, the defendant alleges that the plaintiff was guilty of contributory negligence in one or more of the following particulars:

1) In failing to exercise reasonable care and precaution for his own safety and well-being;

2) In failing to obey instructions not to do heavy lifting or assume any positions which would reinjure his back when he had reason to believe it was beyond his physical capabilities.

By the defense of contributory negligence, the defendant in effect alleges that, even if the defendant may have been guilty of some negligent act or omission which was one of the causes, the plaintiff himself, by his own failure to use ordinary care under the circumstances for his own safety, at the time and place in question, also contributed one of the causes of any injuries and damages plaintiff may have suffered.

The burden is on a defendant, alleging the defense of contributory negligence, to establish, by a preponderance of the evidence in the case, the claim that the plaintiff himslf was also at fault in one or more of the claimed particulars, and that such fault contributed one of the causes of any injuries and consequent damages plaintiff may have sustained.

You may not find contributory negligence on the part of the plaintiff, however, simply because he acceded to the request or direction of the responsible respresentatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions.

INSTRUCTION NO. 13

Section 3 of the Federal Employers' Liability Act, 45 U. S. C. A. § 53, provides in part that:

(Continued on following page)

railroad alleges that the jack was available for installing the pan, but the plaintiff chose not to use it. Additionally, the railroad contends that the plaintiff could have requested additional employees to help carry the pan if he thought it was dangerous. Thus, the defendant argues that because the decision to lift the pan without the jack or additional help was a matter of employee choice, it was not error to instruct the jury regarding contributory negligence. Furthermore, the railroad argues that Wilson was also contributorily negligent on February 28, 1978, in failing to obey the doctor's restrictions on his work activity. We disagree.

The railroad's argument simply is not consistent with the realities of the workplace. Wilson was asked to help carry the pan. As was the custom at the Burlington Northern, he complied with the request. When a man's assistance is needed and asked for, he helps—there is no choice involved.

(Continued from previous page)

> In all actions . . . brought against any . . . common carrier by railroad . . . to recover damages for personal injuries to any employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.
>
> So, if you should find, from a preponderance of the evidence in the case, that the defendant was guilty of negligence which caused, in whole or in part, any injury or damage to the plaintiff, and should you further find, from a preponderance of the evidence in he case, that the plaintiff himself was guilty of cont butory negligence which contributed toward bringing about all or part of his injury, then the total award of damages to the plaintiff must be reduced by an amount equal to the percentage of fault or contributory negligence chargeable to the plaintiff.

Moreover, the argument that Wilson could have used the jack is implausible. At the time of the injury, the pans were always installed manually; no one had used the jack for over a year.[2] In addition, the other three men installing the pan were present and ready to begin carrying it over to the car. Finally, there were railroad cars bunched around the particular car on which the men were working. These cars would have had to be moved in order to use the jack.[3] Obviously, in this situation, Wilson could not reasonably have been expected to decline to carry the pan and to ask that the jack be used instead.

Similarly, there is no evidence that the pans were ever carried by more than four men. Thus, Wilson could not reasonably have been expected to ask that men be pulled off other jobs to help carry the pan when four men were already available.

Under the circumstances present here, Wilson's decision to help carry the pan was not a matter of free choice nor was it in any way unreasonable. He was simply doing his job and assisting other employees in need of help—as the railroad fully expected him to do.

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[2]There is conflicting testimony on whether the defendant ordered the use of the jack terminated. Our decision, however, does not rest on this fact. Regardless of who ordered the use of the jack discontinued, it is undisputed that in February, 1978, the jack was not being used by employees and that the railroad was aware of this fact.

[3]The use of the jack requires a substantial amount of clear track at each end of the hopper car. When the use of the jack was discontinued, railroad cars were bunched together in a fashion that made the use of the jack impracticable unless cars were moved.

Similarly, Wilson did not fail to exercise due care when he was reinjured on February 28, 1978. The railroad's doctor had certified that Wilson was ready to begin working again on February 22. Moreover, the doctor's instructions regarding restricting work activity apparently were nothing more than a perfunctory caution to avoid heavy lifting or assuming other positions that could reinjure Wilson's back and leg.[4] Apparently, the doctor placed no specific restrictions on Wilson's work activity. Under these circumstances, it was hardly a contravention of the doctor's work restrictions—if they can be considered restrictions at all—for a railroad worker who regularly engages in vigorous manual labor to step under a car and hammer a piece of equipment back into place.

Therefore, since there was no evidence that Wilson's own negligence contributed to either of his injuries, the district court erred by permitting the jury to consider the issue. *Paluch v. Erie Lackawanna Railroad Co., supra,* 387 F. 2d at 999; *Morran v. Pennsylvania Railroad Co., supra,* 321 F. 2d at 403.

The defendant next argues that even if there was no evidence of contributory negligence, the district court's instruction was harmless error. Once again we disagree.

Under F. E. L. A., contributory negligence is not a complete bar to recovery; it may be used only to diminish damages. 45 U. S. C. § 53. The amount of an employee's damages is reduced in proportion to the amount of negli-

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[4]The exact language of the physician's cautionary instructions do not appear in the record. The railroad does not point to any evidence that shows that the doctor's restrictions were anything more than an oral caution to avoid heavy lifting as Wilson asserts in his brief.

gence attributable to the employee—regardless of the extent of the plaintiff's contributory negligence. 45 U. S. C. § 53; Woods, *The Negligence Case: Comparative Fault*, at 77 (1978).[5]

Relying on *Rogers v. Southern Pacific Co.*, 172 Cal. App. 2d 493, 342 P. 2d 258, 260 (1959), Burlington Northern argues that even if the district court erred in giving a contributory negligence instruction, F. E. L. A.'s pure comparative negligence scheme renders the error harmless here because the jury found that the plaintiff was not entitled to any damages. The *Rogers* court reasoned that because F. E. L. A. utilizes a pure comparative negligence scheme,

> [i]n order to find its verdict for defendant under these instructions the jury must have found that defendant was guilty of no negligence which contributed as a proximate cause to decedent's death. Under such circumstances any error in the instructions or the admission of evidence relating solely to the decedent's contributory negligence cannot have been prejudicial to appellant.

Id.

There is some logic to the rule propounded by the *Rogers* court. This rule, however, ignores the practical realities that accompany the use of juries and general verdicts. Even with adequate instructions regarding the effect of contributory negligence under F. E. L. A., there is a risk that the jury may fail to understand the statutory comparative negligence scheme. And when, as here, a general verdict is used, a court cannot ascertain whether or

---

[5]F.E.L.A. provides a federal comparative negligence scheme rather than relying on the standards of the states in which the injury occurred. 45 U. S. C. § 51; *New York Central Railroad Co. v. Winfield*, 244 U. S. 147, 149-152 (1917).

not the jury correctly applied the applicable law in deciding to award no damages. Thus, we simply do not share the conviction of the *Rogers* court that because the jury awarded the plaintiff no damages, it *must* have found that the defendant was not guilty of any negligence which caused the plaintiff's injury.

We believe that the better rule is the one followed by the federal courts; that is, when there is no evidence from which a jury could reasonably find a lack of due care by the plaintiff, it is reversible error to submit the issue of contributory negligence to the jury. *E. g., Paluch v. Erie Lackawanna Railroad Co., supra,* 387 F. 2d at 999; *Morran v. Pennsylvania Railroad Co., supra,* 306 F. 2d at 403-404. In short, when there is no evidence from which a reasonable person could find an employee contributorily negligent, there simply is no reason to risk confusing the jury by giving such an instruction. Because of this risk of cc fusion, we cannot say that Wilson was not prejudiced by the unjustified contributory negligence instruction. Therefore, the error was not harmless.

The plaintiff also assigns as error numerous other acts of the district court. Because of our disposition of the contributory negligence issue, we need not reach these contentions. Moreover, because of the importance of the contributory negligence question to the disposition of this case, a new trial is necessary on all issues. Therefore, we reverse and remand this matter for a new trial consistent with our opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 81-1429

September Term, 1981

Wayne T. Wilson,

Appellant,

vs.

Burlington Northern, Inc., a corporation,

Appellee.

Appeal from the United States District Court
for the District of South Dakota.

The Court, having considered petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judge Ross did not take part in the consideration of the petition for rehearing.

March 26, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 79-0-372

WAYNE T. WILSON,

Plaintiff,

v.

Burlington Northern, Inc.,

Defendant.

JUDGMENT

(Filed January 14, 1981)

This action came on for trial before the Court and a jury, Honorable Albert G. Schatz, Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict;

IT IS ORDERED AND ADJUDGED that the Plaintiff take nothing; that the action is dismissed on the merits with prejudice; and that the defendant, Burlington Northern, Inc., recover of the Plaintiff, Wayne T. Wilson, taxable costs of this action.

Dated at Omaha, Nebraska, this 14th day of January, 1981.

WILLIAM L. OLSON
Clerk of the Court

By /s/ Barbara Campbell
Barbara Campbell
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 79-0-372

WAYNE T. WILSON,

Plaintiff,

v.

BURLINGTON NORTHERN, INC.,

Defendant.

ORDER

(Filed March 16, 1981)

This matter coming on for hearing and determination with reference to plaintiff's motion for new trial (Filing No. 24), and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that plaintiff's said motion be and the same is hereby denied.

BY THE COURT:
/s/ Albert G. Schatz
Judge, United States District Court

INSTRUCTION NO. 13

Section 3 of the Federal Employers' Liability Act, 45 U. S. C. A. § 53, provides in part that:

> In all actions . . . brought against any . . . common carrier by railroad . . . to recover damages for personal injuries to any employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

So, if you should find, from a preponderance of the evidence in the case, that the defendant was guilty of negligence which caused, in whole or in part, any injury or damage to the plaintiff, and should you further find, from a preponderance of the evidence in the case, that the plaintiff himself was guilty of contributory negligence which contributed toward bringing about all or part of his own injury, then the total award of damages to the plaintiff must be reduced by an amount equal to the percentage of fault or contributory negligence chargeable to the plaintiff.

INSTRUCTION NO. 20

In connection with each of plaintiff's causes of action, the issues to be determined by the jury in this matter are: First, was the defendant negligent in one or more of the particulars alleged in connection with this claim?

If your unanimous answer to this question is "no," you will return a verdict for the defendant on that cause of action; but if your unanimous answer is "yes," you will then have a second issue to determine, namely: Second, did the negligence of the defendant cause or contribute to the claimed injury and damage to the plaintiff?

If your unanimous answer to this question is "no," you will return a verdict for the defendant on that cause of action; but if your unanimous answer is "yes," you must then find the answer to a third question, namely: Third, was the plaintiff guilty of some contributory negligence in connection with this claim?

If you should find that he was not, then, having found in plaintiff's favor in answer to the first two questions, you will proceed to determine the amount of plaintiff's damages for that claim, and return a verdict on that claim in plaintiff's favor in the amount.

On the other hand, if you should find from a preponderance of the evidence in the case, that plaintiff himself was guilty of contributory negligence, and that plaintiff's fault caused or contributed to any injuries which plaintiff sustained, then you must diminish any damages for this claim in proportion to the amount of negligence attributable to the plaintiff.

You are again reminded that you must determine each of the foregoing issues separately for each of plaintiff's causes of action. You must not permit the determination of any of these issues on the first cause of action to affect the decision on plaintiff's second cause of action.

Supplemental Appendix

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FILED
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CLERK

No. 81-2050

In The

Supreme Court of the United States

OCTOBER TERM, 1981

BURLINGTON NORTHERN INC.,

Petitioner,

vs.

WAYNE T. WILSON,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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BURLINGTON NORTHERN INC.,

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SUPPLEMENTAL APPENDIX TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Pursuant to Rule 28 (1) of the Rules of the Supreme Court of the United States, the following information is provided. Burlington Northern Inc., now known as Burlington Northern Railroad Company, is a wholly owned subsidiary of Burlington Northern Inc. Burlington Northern Railroad Company's subsidiaries and affiliates are as follows (the percentage of ownership appears in the parentheses following the name of the company):

Subsidiaries:

The Belt Railway Company of Chicago (7.69%)
Butte Pipe Line Company (10%)
Camas Prairie Railroad Company (50%)
Chicago Union Station Company (25%)
Davenport, Rock Island and North Western Railway Company (50%)
The Denver Union Terminal Railway Company (33.33%)
Fort Worth and Denver Railway Company (99.98%) and its subsidiary Houston Belt & Terminal Railway Company (12.5%)
Galveston Terminal Railway Company (50%)
Iowa Transfer Railway Company (25%)
Kansas City Terminal Railway Company (16.6%)
Keokuk Union Depot Company (40%)
The Lake Superior Terminal and Transfer Railway Company (66.67%)
Longview Switching Company (33.33%)
Milestone Petroleum Inc. (100%) and its subsidiary Portal Pipe Line Company (50%)
The Minnesota Transfer Railway Company (33.33%)
Paducah & Illinois Railroad Company (33.33%)
Portland Terminal Railroad Company (40%)
The Pueblo Union Depot and Railroad Company (25%)
The Saint Paul Union Depot Company (40.2%)
Terminal Railroad Association of St. Louis (12.5%)
Trailer Train Company (9.7%)
Western Fruit Express Company (97.14%)
The Wichita Union Terminal Railway Company (33.3%)
Winona Bridge Railway Company (66.67%)

Affiliates:

BN Financial Services Inc.
BN Timberlands Inc.
Burlington Northern Air Freight Inc. and its subsidiaries:
- Burlington Northern Air Freight (Aust.) Pty. Limited (99.99%)
- Burlington Northern Air Freight (U. K.) Limited
- Burlington Northern Customs Brokerage Inc.

Burlington Northern International Services Inc.
Burlington Northern Ocean Forwarding Company
BNL Development Corporation
Glacier Park Company and its subsidiaries:
Burlington Northern Airmotive Inc.
Dreyer Bros., Inc.
Royal Logging Co.
Saxony Corporation
Western Fruit Express Company (2.86%)
New Mexico and Arizona Land Company (50%) and its subsidiaries:
NZ Development Corporation
NZ Properties, Inc.
Plum Creek Inc. and its subsidiaries:
Arden Lumber Company, Inc.
Douglas Transportation Company
Ksanka Lumber Co., Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of the foregoing Supplemental Appendix to the Petition for a Writ of Certiorari to be served on Patrick J. Foley, 608 Building, Suite 565, 608 Second Avenue South, Minneapolis, Minnesota, 55402, and John J. Higgins, Suite 650, Continental Building, Omaha, Nebraska, 68102, by United States Mail, adequate postage prepaid, first class, on this 12th day of May, 1982.

Original Signed by
RICHARD A. KNUDSEN

Richard A. Knudsen

Opposition

Office - Supreme Court, U.S.
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MAY 20 1982
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CLERK

No. 81-2050

IN THE

Supreme Court of the United States

October Term, 1981

BURLINGTON NORTHERN, INC.,
Petitioner,

vs.

WAYNE T. WILSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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1982—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

STATEMENT OF QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eighth Circuit correctly held that in an action brought under the Federal Employers' Liability Act, 45 U.S.C. Section 51 et seq., the evidence barred an instruction to the jury on the issue of contributory negligence and was reversible despite the verdict in favor of the defendant.

2. Whether the United States Court of Appeals for the Eighth Circuit correctly held that the evidence in an action brought under the Federal Employers' Liability Act, 45 U.S.C. 51 et seq., was insufficient to justify the submission of the issue of contributory negligence of the injured railroad employee to the jury.

3. Whether this Court should issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review that Court's decision which relied on instructions numbers 12 and 13 and the petition for certiorari relies on instructions 13 and 20.

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IN THE

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No. 81-2050

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vs.

WAYNE T. WILSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Respondent Wayne T. Wilson prays that this Court refuse to issue a Writ of Certiorari to review the decree of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled matter on February 8, 1982; and the order of the United States Court of Appeals for the Eighth Circuit denying Burlington Northern's Petition for Rehearing En Banc entered on March 26, 1982.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as: *Wilson v. Burlington Northern Inc.*, 670 F.2d

780 (8th Cir. 1982). A copy of the Eighth Circuit's opinion has been included in the Appendix (A. at App. A-1). The Eighth Circuit denied Burlington Northern's Petition for Rehearing En Banc, without opinion on March 26, 1982. A copy of the Eighth Circuit Order has been included in the Appendix (A. at App. A-11). The United States District Court for the District of Nebraska denied the Respondent's Motion for a New Trial without opinion. The Judgment of the United States District Court for the District of Nebraska has been included in the Appendix (A. at App. A-12). The District Court's Order denying the Respondent's Motion for a New Trial has also been included in the Appendix (A. at App. A-13).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit filed its opinion and decree on February 8, 1982 (A. at App. A-1). On March 26, 1982, the Eighth Circuit denied the Burlington Northern's Petition for Rehearing En Banc (A. at App. A-11). This respondent Wayne T. Wilson does not object to the jurisdiction of the Court as invoked under the provisions of Title 28, United States Code, Section 2101(c).

STATUTES INVOLVED

The statutes involved in the present case are Sections 51 and 53 of Title 45 of the United States Code.

Title 45, Section 51 provides:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the

States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefit of this chapter.

45 U.S.C. §51.

Title 45, Section 53 provides:

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such em-

ployee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. §53.

STATEMENT OF THE CASE

Because of the serious omissions in the statement of the case as described in the Petition, respondent Wayne T. Wilson believes it is critical to an understanding of this matter that a more detailed statement of the facts be made.

Respondent Wayne T. Wilson started working for the Burlington Northern in May, 1970, shortly after having been graduated from high school. He worked in the car department and several years later was promoted to carman. He worked in Lincoln, Nebraska. At least in 1976, and perhaps before that time, the B.N. had constructed and used a building, 33, for the repair of airslide hopper cars. These cars are used primarily for the transportation of commodities, principally sugar and flour. Each hopper has four tanks, which are wide at the top of the covered hopper and then narrow to a long slit at the bottom down toward the center of each quadrant of the car, the opening being approximately 16 inches wide and 18 feet long at the bottom. Because of the commodities to be carried, the hopper cars have been equipped with a pan at the bottom for the injection of air upon a canvas covering over the top of the open pan; and this air causes a disturbance which results in assisting the flour or sugar to be emtied at the bottom of the car through a chute designed for that purpose.

The hopper cars are brought to Building 33 for periodic maintenance and repair. The pan at the bottom of each tank in the hopper car is approximately 15 feet long, 18 inches wide, and it weighs about 290 pounds.

The installation and removal of pans is effected by the jacking up of the hopper car, removal of the wheel structures called trucks from underneath the car, placing the car on stands, and then a mechanical replacement of the pan. A machinist at the Havelock Shops in Lincoln designed and made a jack for the use of the persons installing and removing the pans. This jack was so designed that it could carry a pan by the insertion of the jacks hook or nob on the raising portion into a hole in the center of the pan; the jack would then, along with the pan, be wheeled from the end of the car underneath the car and then manipulated to lift the pan into place. Because the pan would be placed on the jack by use of an electric hoist, there was no manual labor involved in the lifting of the pans at any time.

The practice changed in January, 1977, 13 months before Wilson was injured. In January, 1977, the use of the jack was terminated. The supervisor of Building 33 at that time testified in the trial that "we quit using it" in January, 1977.

Guitzenhauer was a foreman for a long time at Building 33. He confirmed that the use of the jack was discontinued in January, 1977, although he did not know why it was discontinued or on whose orders. Respondent Wilson testified that he himself was told by Guitzenhauer that he Wilson could not use the jack to install pans.

The use of the jack in installing and removing the pans required a great deal of trackage on each end of the car, for the jack carrying the individual pan would be inserted

under the car from its end. The discontinuance of the jack was followed by a bunching of the cars and the trucks in such fashion as to make the use of the jack impracticable.

The foreman, Terry Daehling, testified that Building 33 reconditioned approximately 15 cars per month, which would be 180 cars or 720 pans per year. The hydraulic jack had been made especially for the movement of these air slide hopper pans by a machinist. It had wheels on it and a hydraulic pump. The electric hoist picked up the pans from where they were stored and set the pan on the hydraulic jack, which then is pushed into place. Daehling did not decide not to use the jack and hoist system, knows of no one in management who did make that decision, and is aware that management made no study for a method alternative to the jack and hoist combination.

Daehling testified that the petitioner Burlington Northern prepared a safety book to improve the safety of the employees because there were "too many injuries," but no safety rule, however, was made as to how to install the hopper pans. He did testify that the railroad management personnel "generally understand--that it is safety to lift heavy objects with a mechanical device rather than by hand." The electric hoist was described as a "safety feature." He said that he did not decide to terminate using the hydraulic jack, and respondent Wilson did not make the decision to eliminate the jack. The Burlington Northern has people who are capable of studying the safety aspects of devices and holds regular safety meetings. However, there was never any discussion to his recollection in regard to the safety of installing these pans.

George Farrell, the supervisor of Work Practices and Training, said that he made studies of safety procedures

and was aware of the procedure of four persons lifting the air slide hopper pans instead of the old system of the use of the hydraulic jack and electric hoist. He filed a report on inspection after Wilson had been injured. The report concluded that "we are in the process of either going back to using a jack or remodeling it so it is not so hard to use." That was Farrell's safety judgment, "to improve the safety protections for the workers." He agreed that lifting a heavy piece of equipment in a bent or stooped position is one of worst possible conditions for producing an injury to the back. He thought that the safety of the workers would be improved by use of the jack. He agreed that the jack was "designed to assist in the efficient operation of putting in the pans." And that method would be safe. Farrell said that the use of the hydraulic jack was "reasonably safe."

A primitive method was then devised for the installing of pans. This resulted in Wilson's injury. Four men carried each pan approximately 20 feet from a storage space to the car. The car at the time would be up on stands, and the outside bottom of the car would be approximately 4 feet off the ground. The men carrying the pan would bend under that floor and carry the pan underneath the car, where there was more room and they could straighten up a little bit; but still in a bent position, the four men would then lift up the pan into its place. It was in lifting a pan that plaintiff was injured.

Respondent Wilson testified that his injury could have been avoided by the use of a jack. He understood that he could not use it. He was not assigned to that specific job as his solitary duty for the day but rather was working with a group of other men, who needed one more person to assist in lifting a pan. Terry Daehling, building supervisor,

testified that whenever men need additional help, the additional men help and that is exactly what Wilson was doing at the time that he was injured.

Wilson's fellow worker, Adkins, was carrying the pan at the same end with Wilson at the time of Wilson's injury. He testified that the practice was "dangerous." He said that this was a dangerous condition because of the heavy weight of the pan and the position in which one had to be to do the work. Wayne Parker testified that he was working at the time of Wilson's injury, was familiar with the jack, had never used it, and had never seen it used. If the jack and the hoist were used to lift, it was obvious through Foreman Guitzenhauer's testimony that there would be no heavy lifting on the men.

Respondent Wilson's injury occurred on February 6, 1978. He had been doing some other work and was asked to assist the three persons working on the pans, and he did that in the customary way. The cars were close together on the track in Building 33. The use of the hoist and the jack had been described by the foreman Guitzenhauer as "too slow" and took "too much room." Wilson had never seen the jack used after it had been placed outside the building more than a year before the injury. Wilson and Kenny Adkins carried one end of the pan, and two other workers carried the other. They had to squat down to get under the side of the car, and in the squatting position and while carrying the 290 pound pan, walked under the side of the car, which meant bending down to four to five feet in height. In the squatting position, they carried the pan to the area where they would place it in position; and as they lifted, he felt a pain in his back and down into his leg.

Respondent Wilson reported to the physician hired by the

company for medical care of the employees and complained about pain in his back and shooting pain with numoness in his leg. The physician had him return to work in an office for two days, and then he underwent therapy for awhile. On February 22, 1978, Exhibit No. 3, the company doctor certified that he is "able to work as welder on February 22, 1978." The only restrictions on his activities was that the company doctor told Wilson to avoid "heavy lifting."

On February 24, 1978, the day of the second injury, Respondent Wilson was working with his helper on air slide hopper cars. The bottom of the adjustable shaft was about 2 ½ feet from the ground. The helper asked for assistance, and Wilson went down to his hands and knees to look at the equipment. He saw that the chute was out of alignment, and he hammered it back and then stood up and felt pain in his back and leg. He had not been told to avoid bending or stooping .

Wilson underwent surgery for the injury. Dr. Maurice Margules, a neurosurgeon, said that the incident involved in his lifting and squatting under the car on February 6, 1978 was the "worst possible position that body mechanics can tolerate." He described it further as "the possible ideal way to sustain an injury to your lumbar region." The incident of February 24, 1978 resulted in an aggravation of the condition which had been injured on February 6, 1978.

Respondent Wilson has never been approved by any physician to return to work for the railwork, and he has not done so.

REASONS WHY THIS COURT SHOULD NOT GRANT THIS WRIT

I.

THE PETITION CITES ONLY SOME OF THE INSTRUCTIONS AND VARIES FROM THE INSTRUCTIONS CITED IN THE COURT OF APPEALS

Petitioner Burlington Northern Inc. in its Petition cites two instructions of the Court on contributory negligence. Pet. Br., p. 10. The Court of Appeals for the Eighth Circuit predicated its decision on instructions 12 and 13, not 13 and 20. Furthermore, the Court of Appeals did not issue a generalized principle regarding appellate review of an erroneous instruction on contributory negligence when the verdict is for the defendant. On the other hand, what the Court of Appeals ruled is that there was a risk of confusion among the jurors when there was no evidence of contributory negligence. The Court of Appeals said in part:

> In short, when there is no evidence from which a reasonable person could find an employee contributorily negligent, there simply is no reason to risk confusing the jury by giving such an instruction. Because of this risk of confusion, we cannot say that Wilson was not prejudiced by the unjustified contributory negligence instruction. Therefore, the error was not harmless. App. at p. A-9.

The Court of Appeals therefore was concerned about the instructions as a whole and ruled that there was no way that the Court could determine whether the jury correctly applied the law regarding contributory negligence.

The risk of confusion is exemplified by a portion of instruction no. 13, which reads in part as follows:

> So, if you should find, from a preponderance of the evidence in this case, that the defendant was guilty of negligence which caused, in whole or in part, any injury or damage to the plaintiff, and should you further find, from a preponderance of the evidence in the case, that the plaintiff himself was guilty of contributory negligence which contributed toward bringing about all or part of his own injury, then the total award of damages must be reduced by an amount equal to the percentage of fault or contributory negligence chargeable to the plaintiff. App. at p. A-14.

The identification of the contributory negligence of the plaintiff (respondent Wilson herein) with the negligence of the defendant (petitioner herein) contributed to the confusion which is not eliminated by the record as presented in the Petition. Because the risk of confusion related to the instructions, there is no way for this honorable Court to make an adequate review to determine whether in fact there was an unnecessarily high risk of confusion. The Court should, therefore, deny this Petition.

II.

THE COURT OF APPEALS CORRECTLY FOUND, DESPITE A VERDICT IN FAVOR OF THE RAILROAD, THAT THE TRIAL COURT HAD ERRONEOUSLY SUBMITTED THE CONFUSION ISSUE OF CONTRIBUTORY NEGLIGENCE OF THIS RAILROAD EMPLOYEE.

The Court of Appeals ruled that "since there was no evidence that Wilson's own negligence contributed to either of his injuries, the District Court erred by permitting the jury to consider the issue." App. p. A-7.

Petitioner Burlington Northern contends that the error

of instructing on contributory negligence is not reviewable in this case because the verdict was for the Burlington Northern, petitioner herein. Because of the restricted nature of the Court of Appeals decision, this Court should not issue the Petition to review the opinion and decision of the Court of Appeals.

It is clear that it is error and improper to instruct on the issue of contributory negligence in the absence of sufficient evidence on that issue. *Eichmann v. Dennis,* 347 F.2d 978, 981 (3d Cir. 1965). The Court there held in a wrongful death claim based on Pennsylvania law that the verdict for the defendant did not bar a reversal for improper instruction on the issue of contributory negligence. Even in the absence of exceptions and objections to the instruction on contributory negligence, the appellate court will reverse when the instructions allow the jury to speculate on contributory negligence and wreak "* * * a miscarriage of justice." *Paluch v. Erie Lackawanna R.R. Co.,* 387 F.2d 996, 1000 (3d Cir. 1968).

There is a great danger in instructing an issue not justified by the evidence, for the charge to the jury may shift the jury's focus. In *Smith v. Lauritzen,* 356 F.2d 171 (3d Cir. 1966), the Court instructed in the Longshoreman's claim that the assault may have been justified in self defense or had been sufficiently provoked. In the absence of evidence justifying that allegation, the Third Circuit said:

> The Court's charge to the jury in the instant case, however, shifted the jury's focus from the dangerous nature of a cargo hook when used as a weapon, to the question of whether or not the hook was also a tool in everyday use in the trade. 356 F.2d at 171.

Because the erroneous instruction shifted the focus of attention of the jurors, a new trial was ordered.

The present case arises under the Federal Employers' Liability Act. Even in a diversity action in Federal Court, the grant or denial of jury instructions is controlled by federal law and the Federal Rules of Civil Procedure. *Wright v. Farmers Co-op of Ark. & Okla.*, 620 F.2d 694, 696 (8th Cir., 1980). In that case, erroneous instructions about which no evidence had been presented could have misled the jury and therefore required a new trial. In *O'Neill v. Reading Co.*, 306 F.2d 204 (3d Cir. 1962), the decedent Smith was killed as a result of a collision of his truck and a train. The verdict for the defendant was returned, and the decedent's estate sought a new trial because of erroneous instructions. One of the instructions involved whether there was frost on the windows of Smith's truck, although there was no evidence to support that instruction. That manifestly is an issue going to contributory negligence, and despite the verdict for the defendant, the Court of Appeals reversed and ordered a new trial.

The controlling decision in the Courts of Appeals is *Harless v. Boyle-Midway Division*, 594 F.2d 1051 (1979). The claim there arose for the wrongful death of Michael Harless as a result of an intentional inhalation of Pam, a household product. The jury returned a verdict for the defendant. One of the issues on appeal, and one of the issues requiring the new trial, was an instruction by the Court. The Court of Appeals pointed out that in determining the adequacy of the instructions, "one must view the instructions as a whole." 594 F.2d at 1054. The Court added that "in the instant case this is particularly important since the applicable law is governed by the principles of comparative negligence." *Ibid.* That case, like the one pending before the Court by the Petition filed herein involves comparative

negligence. The complication on the instructions was the adequacy of a label and of course the obligation of the decedent to read the adequate label. The Court of Appeals found the instructions to be inconsistent and said:

> It seems both confusing and internally inconsistent to ask a jury who has previously concluded that the label was *inadequate* to consider the defense of failure to read an *adequate* label. Indeed, if the label is considered adequate, appellant concedes that she has no claim against appellee. Thus, we deem the instruction to be in error. 594 F.2d at 1055.

The Court of Appeals in a footnote made the following lengthy but critically important analysis of why it is that an issue on comparative or contributory negligence must be reviewable on appeal despite the verdict for the defendant. The Court made the following comment:

> It might be argued that any error that occurred in the instructions with regard to the defenses would necessarily be only harmless error because the jury returned a general verdict for the defendant-appellee. The theory underlining this argument is that under the instructions given to the jury, for them to have returned a general verdict for appellee, they must have found either that appellee was not negligent or that if it was negligent, its negligence was not the proximate cause of death. Under the instructions given it would be only after a finding that appellee was negligent and that negligence was a proximate cause of death that the jury would consider defenses raised by appellee.
>
> Upon consideration of the defenses, if the jury did not view the great weight of the evidence as supporting the defenses of appellee they were instructed to find for the appellant. If, on the other hand, they were per-

suaded that both appellant and appellee were negligent and the negligence was a contributing legal cause, the jury was to find for the plaintiff-appellant and prorate the amount of damages sustained by her in the same proportion that the deceased's negligence contributed to the damages. Thus, under either alternative, if the jury considered the defenses, they would have to have found for the plaintiff-appellant and awarded at least nominal damages.

While this theory is facially correct, it pre-supposes that the jury took a comparmental view of the issues and did not consider the defenses raised by appellee when determining the issue of the legal cause of death. More specifically under the reasoning of this theory, it must be assumed that the jury did not consider the issues of the failure to read the label or the violation of a statute in their determination that the negligence of appellee was not the legal cause of death. This assumption flies in the face of reality when it is recalled that in determining the issue of the legal cause of death the jury was asked to consider the following:

> However, the negligence of a person is not the legal cause of injury if it is interrupted by a separate, independent and efficient act done; that is, if it is interrupted by an act which is not reasonably foreseeable and which is sufficient in and of itself to cause the injury.

Consequently, we cannot agree with the view that any alleged errors in the instructions pertaining to the defenses asserted by appellee would be merely harmless error.

In that footnote, the Fifth Circuit Court of Appeals clearly pointed out the reality of the jury decision-making process. When the jurors are instructed to consider a variety of factors in determining the negligence of the defendant, in

this case the petitioner Burlington Northern, it would be unrealistic to assume that the jury did not consider the contributory negligence of the plaintiff, respondent Wilson herein, as specifically allowed by the trial court. Because there was no evidence of contributory negligence on the part of respondent Wilson, the element of what or who caused respondent Wilson's injuries was complicated by an irrelevant and improper factor, that is the possible though groundless contributory negligence of respondent Wilson.

The cases cited by petitioner are not helpful when it appears in the present case that there is no evidence to support any instruction on contributory negligence and further when it appears that timely objection was taken to the erroneous instructions.

A further element distinguishing petitioner's authorities is that there is no evidence in this case that the cause of respondent Wilson's injuries was attributable to unavoidable accident or an act of God. The evidence demonstrates an absence of contributory negligence. The evidence demonstrates only that the employer, petitioner Burlington Northern, was negligent or that there was no negligence at all.

Petitioner cites *Rogers v. Southern Pacific Co.*, 172 Cal. App.2d 493, 342 P.2d 258 (1959), but the case is clearly distinguishable. There, the California Court held that the jury had been properly instructed on the Federal Employers' Liability Act. There was evidence justifying an inference of contributory negligence and there was a proper instruction on contributory negligence. That is totally dissociated from the element in this case, where the instruction on contributory negligence should not have been given under any circumstances by reason of the total absence of evidence which would justify such an inference. Indeed,

petitioner in its brief stated that portion of the *Rogers* opinion which stated that "the jury was properly instructed that under the Federal Employers' Liability Act the contributory negligence of an employee is not a complete defense but merely a ground for diminishing the amount of recovery." Pet. Br., p. 7-8. Thus it is that that case is legitimate authority only when the evidence warrants the instruction.

Petitioner's second authority is *Tracy v. Terminal R. Ass'n. of St. Louis,* 170 F.2d 635 (8th Cir., 1948). In that case, there was a hotly contested factual issue as to whether plaintiff's decedent was properly working between two cars on the switch track when the cut of cars was caused to be moved and cause his death or whether the decedent had been running along the train and stumbled over coal, tripped, and was crushed. It was suggested by the railroad in that case that Tracy had reached between the cars but should not have. The representative of Tracy's estate asserted that Tracy had been between the cars while they were standing still and the cars then were moved in such manner as to cause his death. The ultimate test was for the jury to determine whether Tracy had stepped between the cars while they were still or while they were moving. There was evidence suggesting each of the two versions. There were no exceptions to the instructions. There was nothing to review for the Court of Appeals.

This Court should deny the petition for a writ of certiorari because without foundation, the trial court allowed the jury to ascribe cause for respondent Wilson's injuries to the actions of petitioner Burlington Northern or to respondent Wilson although there was no evidence that could legitimately be used as a predicate for such jury inference. The trial court therefore erred in allowing the jury to infer

contributory negligence as a cause. If the jury had been told that there was no contributory negligence for consideration of the jury, and because there was absolutely no evidence suggesting that there was any other cause or factor except the negligence of the railroad, the jury would then have been able properly to consider the liability of the railroad without the confusing issue interjected by the trial court. There is no known cause beyond the railroad's negligence in this case. This Court should deny the Petition for a Writ of Certiorari.

III.

THE COURT OF APPEALS PROPERLY HELD THAT THE EVIDENCE IN THIS FEDERAL EMPLOYERS' LIABILITY ACT LAWSUIT WAS INSUFFICIENT TO JUSTIFY SUBMISSION OF CONTRIBUTORY NEGLIGENCE THROUGH THE JURY.

Petitioner in its Brief, pages 11-16, seems to argue for the articulation of a legal principle on contributory negligence, but respondent Wilson respectfully submits that that should not be done solely under the guise that there is evidence justifying that submission in this case.

The evidence clearly demonstrates that respondent Wilson was guilty of no contributory negligence. The evidence is that since January, 1977 for the 13 months up to plaintiff's injury, there was one way of installing the airslide hopper pans. Four people carried each 290 pound pan in under the side of the railroad car and put it in by lifting it up while they were in a bent over position. This was done on the approximately 15 cars, 60 pans, per month. That was the customary way of doing the work. The safety officer, Ferrell, was aware of this. The building supervisor,

Daehling, was aware of this. A variety of persons involved in this work from time to time had done it with this systematic approach of manual labor.

Supervisor Daehling testified that the Burlington Northern had written a safety book because there were "too many injuries," but he said that there was no safety rule on how to install the airslide hopper pans. He knew that the decision to terminate using jacks had been made, and he knew that Wilson did not make that decision. Management made no study to determine whether the jack should be terminated, although the B.N. had people who were capable of studying the safety aspects of devices. Daehling testified that railroad personnel "generally understand--that it is safer to lift heavy objects with a mechanical device rather than by hand." Ferrell, the safety officer, was aware that the work was being done by manual effort rather than mechanical device. His testimony excludes any possibility of contributory negligence when he testified that there had been no previous injury from the lifting of the pans. This necessarily excludes contributory negligence, for the carrier's obligation is to provide reasonably safe and adequate devices, methods, and supervision. Those responsibilities to provide what is reasonably safe fall only on the carrier, not on the employee, respondent Wilson. The absence of a history of injuries necessarily excludes any foreknowledge to respondent Wilson that this was a very dangerous position to be in when lifting a very heavy object.

Wilson was called in by three other people to assist in the installing of this one pan. He did not devise the system, or foreclose any other systems, or have supervisory authority, or have any choice. The jack had not been used for 13 months, all that time lying outside.

Because of the absence of earlier injuries, respondent Wilson cannot be charged with contributory negligence. The Eighth Circuit held in *Lowden v. Hanson,* 134 F.2d 348 (8th Cir. 1943) that "while custom or usage may not be controlling as fixing the standard of care it may be accepted where the custom or practice is not in itself negligent or in disregard of the safety of the employee."

Respondent Wilson went to the physician selected by the Burlington Northern for medical care after his injury of February 6, 1978. That company doctor heard Wilson's complaint of pain in his low back with shooting pain into his leg, which then became numb. The physician released him for light duty. He then received some physical therapy and on February 22, 1978, the physician in Exhibit 3 released him as "able to work as welder on February 22, 1978." He made an oral instruction to Wilson to avoid "heavy lifting." There were no other restrictions.

Wilson then sustained the aggravating injury on February 24, 1978, when the helper working under Wilson's general supervision requested assistance; and Wilson then got down on his hands and knees and went under an airslide hopper car to look at the chute at the bottom. On standing up, he felt a recurring pain.

There is no medical dispute that the second incident is an aggravation of the pre-existing condition. The carrier's physician was asked whether there should have been some caution, and he said "I think that that is just common sense, to tell him to be careful about bending over, but there is no specific advice in that regard."

A verdict for the defendant on count two is unconscionable. The propriety of a new trial is established by *Isgett v. Seaboard Coastline R. R. Co.,* USDC SC, 332 F.Supp.

1127 (1971). The decedent there had a serious medical condition, diabetes mellitus. He was off because of an ulcerated foot for a period of time and returned to work but was rejected. His personal physician reported that he was able to return to work, and then the railroad examining physician approved him to return to work. After he had returned, the presence of water around the railroad yard reacted harmfully on plaintff, and he had blisters form on his feet. One foot was removed, gangrene set in, and he had recurring problems until his death. The Court stated in quoting from an earlier decision that:

> The employer's duty to its employees is to use reasonable care and prudence to the end that the place in which they are required to work, and the appliances with which they work, are reasonably suitable and safe for the purposes, and in the circumstances, in which they are to be used. 332 F.Supp. at 1139.

Regarding the role of the company physician, the Court said the following:

> If an employer undertakes to ascertain whether an employee is physicially fit for the job or to diagnose or treat his condition, the employer is liable if he performs such ascertainment in a negligent fashion and injury results. *Ibid.* at 1141.

The Court found that the claimant there had been injured because of the negligence of the defendant in failing to provide a safe place, safe conditions, in assignment of a noticeably, known, sick person to a hard task.

The assignment of Wilson with his manifestation of a herniated disc without any physical restrictions or without any advice other than not to lift over 25 pounds certainly establishes negligence against the railroad. In *Dunn v.*

Conemaugh and Blacklick R. R. Co., USDC PA 162 F. Supp. 321 (1958), it was pointed out that the claim against the railroad for erroneous clearance for duty by the company doctor does not require proof of malpractice against the physician. The test is whether the railroad knew that the employee was unable to do hard work and nevertheless ordered him back to work. The Court held there that the employee had been forced to return to work prematurely and that the physician certified him for working.

The net effect of the evidence in this case is to prove that a combination of forces militated against Wilson and contributed to his injury. The courts have for many years agreed that a combination may attach liability to the railroad. See *Blair v. B&O R. Co.*, 323 U.S. 600 (1945). That case seems to have been written as precedent for this case, where a heavy object of bulky size had to be carried by only four persons in cramped quarters, in a bent position, and then lifted one end at a time. If the law be that the railroad is required to provide reasonably safe place to work with reasonably safe conditions and reasonably adequate equipment, the law has been perverted by the verdict and judgment in this case. Justice clearly mandates a new trial, at least on Count Two.

Petitioner in its brief suggests that this Court should grant *certiorari* to determine the quantum of proof necessary to present to a jury the issue of contributory negligence. This is a guise for attempting to suggest that there is a necessity to determine the propriety of the contributory negligence instruction. The fact of the matter is that there is no real judicial doubt as to the quantum of proof. The legal principles have been well established. However, petitioner's brief cites cases as the ostensible authority for re-

quiring review in this case as in conflict with the earlier authorities. Thus, petitioner seems to argue that there is no principle establishing the quantum of proof and on the other hand contends that the Court of Appeals decision here is in conflict with earlier decisions of this Court. A review of a few of the decisions will show that there is no particular authority demonstrating a need to review this case.

Petitioner cites the fundamental decision of *Rogers v. Missouri Pacific Railroad,* 352 U. 500 (1957) as the authority discussing evidence sufficient to present a jury issue. However, that case has an amazing similarity to the case at bar. Rogers had been assigned to burn off weeds and vegetation by use of a crude hand torch; and to do this work, he had to stand by the vegetation and walk along the railroad right of way. A train whistle alerted him to impending danger, and he ran to an area near a culvert, and the passing train fanned flames from the burning vegetation and caused him to take emergency defensive measures which resulted in his slip and fall from the culvert. He sustained serious injuries. The similarity is that he was assigned to this work but that it had historically been customary to burn off the vegetation with a flame thrower operated from a car running on the tracks. This safety measure had been terminated approximately one year before the injury to Rogers. As in the present case, the safe practice had been terminated a year before the injury. Furthermore, this Court stated that "we think that the evidence was sufficient to support the jury finding for the petitioner."

The Burlington Northern's Petition, p. 13, cites *Lavender v. Kurn,* 327 U.S. 645 (1946) as the authority foreclosing undue invasion of the jury function. That case

specifically concluded "* * * that there was evidence from which it might be inferred that the end of the mail hook struck Haney in the back of the head * * *." 327 U.S. at 652. The Court based its decision on disputes in the fact, with the jury being allowed to draw its inferences. The Court said that "only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." 327 U.S. at 653. Thus, for a jury determination to have priority, indeed an immunity from appellate review, there must be probative facts supporting that decision.

Petitioner cites *Chicago, Rock Island and Pacific R. R. v. Melcher,* 333 F.2d 996 (8th Cir. 1964), Petition p. 13, as in conflict with the case at bar. The employee there had recovered a verdict, and the verdict and judgment were affirmed. The evidence was clear that the passenger car door was defective before the train left the station. The evidence allowed the rational inference that failure of the door could have involved something more than accumulation of ice and snow on the track. 333 F.2d at 996. The pre-emptive right of the jury to draw inferences was again stated by the Court, but it was in the context of a factual predicate for those inferences. Thus, that case is directly consistent with the present case, and the combination hold the following: when there is evidence, the jury may draw rational inferences; when there is no evidence on a particular issue, there is no jury issue. The last case to be discussed as cited by the Petition, p. 14, is *Panger v. Duluth, Winnipeg & Pac. Ry. Co.,* 490 F.2d 1112 (8th Cir. 1974). The Court of Appeals there stated that the trial involved "a factual dispute between the parties * * *." 490 F.2d at 1115. The Court held on the same page that "we think that there was evidence before

the jury which would justify with reason a conclusion that there was at least some employer negligence involved in the accident * * *." *Ibid.* The entire opinion is repetitious about the details of the evidence and the conflict and dispute thereon. Again, the Court of Appeals for the Eighth Circuit in the present case was directly consistent with its cited precedents, and consistent with this Court's decisions, on the subject of instructing only when there is a factual base.

CONCLUSION

The Petition cites no basis for this Court to articulate a general principle of law. The authorities which it cites are clearly consistent with the decision of the Court of Appeals in this case. There is no need for this Court to review the quantum of evidence as evaluated by the Court of Appeals.

Because the Court of Appeals decision was consistent with its own earlier decision, consistent with the applicable decisions of the Courts of Appeals, and consistent with this Court's opinions, and because the Petition is based primarily upon an evaluation of evidence, there is no need for this Court to attempt to develop a generalized principle of law different from what is stated in the opinion of the Court of Appeals and no need to review the rights of the individual litigants here on a record that involves evaluation of evidence.

This Court should deny the Petition for a Writ of Certiorari to review the decision of the Court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As one of the attorneys for the Respondent herein, I do hereby certify that pursuant to Rule 28(3) of the Rules of the Supreme Court of the United States, I caused three copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to be served upon Richard A. Knudsen, Knudsen, Berkheimer, Richardson & Endacott, 1000 NBC Center, Lincoln, Nebraska 68508, by United States Mail, postage prepaid, on this 18th day of May, 1982.

Original signed by Patrick J. Foley

Patrick J. Foley

Appendix

APPENDIX

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 81-1429

Wayne T. Wilson,

Appellant,

vs.

Burlington Northern, Inc., a corporation,

Appellee.

Appeal from the United States District Court
for the District of Nebraska

Submitted: October 16, 1981

Filed February 8, 1982

Before HEANEY and STEPHENSON, Circuit Judges, and DAVIES,* Senior District Judge.

HEANEY, Circuit Judge.

Plaintiff Wayne Wilson was injured while employed by Burlington Northern, Inc. He brought suit against the

*The Honorable RONALD N. DAVIES, United States Senior District Judge, for the District of North Dakota, sitting by designation.

railroad under the Federal Employer's Liability Act (F.E. L.A.), 45 U.S.C. §51 *et seq.* After a trial, the jury found that the plaintiff was not entitled to recover damages. The plaintiff appeals from the district court's denial of his motion for a new trial. We reverse and remand for a new trial.

I. *FACTS.*

Wilson was injured while helping carry a large pan that attaches to a railroad hopper car. The pan is approximately fifteen feet long, eighteen inches wide and weighs about 290 pounds. At the time Wilson was injured on February 6, 1978 the pans were installed manually. Four persons carried each pan approximately twenty feet from a storage area to the hopper car. The car at that time would be on stands, with the bottom standing approximately four feet above the ground. The men would bend over and carry the pan beneath the car, where they would then lift up the pan and attach it to the car.

Prior to January, 1977, the pans had been installed by using a mechanical jack which required no manual lifting. In January, 1977, however, the railroad's employees stopped using the jack. At the time of his injury, Wilson was of the understanding that the jack could not be used to install pans. The railroad contends that it did not order the use of the jack terminated and that "the jack was available and could be used on the date of the injury." The fact remains undisputed, however, that regardless of who ordered the use of the jack to be discontinued, for approximately one year prior to the injury, defendant's employees had not used the jack to install the pans.

On the day of the injury, Wilson was not assigned the

specific task of installing pans in hopper cars. Instead, a group of men with whom Wilson was working asked him to assist them in carrying a pan. As was the custom at the Burlington Northern, Wilson complied with the request to aid others asking for additional help. While lifting the pan into place, Wilson felt a pain in his back and leg.

Wilson reported the injury to the company physician and underwent therapy for a brief period. Thereafter, the company doctor certified that Wilson was "able to work as a welder on February 22, 1978," The doctor did not instruct Wilson to restrict his activities, other than cautioning him to avoid "heavy lifting." On February 24, 1978, Wilson was again working with another man on a hopper car. When asked for assistance, Wilson got down on his hands and knees to inspect the equipment on the bottom of the car. He hammered a chute into alignment, and when he stood up, he again experienced pain in his back and leg.

Wilson underwent surgery for his injury, and left his job with the railroad. He has never been approved by a physician to return to work for the railroad and has not done so.

Wilson sued the Burlington Northern in two counts under F.E.L.A. for negligently causing his injury. Wilson's first cause of action alleged that the railroad's negligence caused his initial injury on February 6, 1978. The second cause of action alleged that the Burlington Northern negligently caused the plaintiff's reinjury to his back and leg on February 28, 1978. After trial, the jury returned a general verdict against the plaintiff. The district court entered judgment for the defendant and denied the plaintiff's motion for a new trial. The plaintiff now appeals to this Court.

II. *DISCUSSION.*

The plaintiff contends that the district court erred in submitting the issue of contributory negligence to the jury, In a F.E.L.A. case, the burden of proving contributory negligence is, of course, on the railroad. *E. g., Paluch v. Erie Lackawanna Railroad Co.*, 387 F.2d 996, 999 (3d Cir. 1968). A defendant is entitled to a contributory negligence instruction if there is any evidence to support that theory. *E. g., Dixon v. Penn Central Co.*, 481 F.2d 833, 835 (6th Cir. 1973). But if no evidence is presented from which a jury could properly find a lack of due care by a plaintiff, then it is generally fundamental error for the district court to give a contributory negligence instruction, and a plaintiff is entitled to a new trial. *Paluch v. Erie Lackawanna Railroad Co., supra,* 387 F.2d at 999; *Morran v. Pennsylvania Railroad Co.*, 321 F.2d 402, 403 (3d Cir. 1963).

The defendant contends here that thre was sufficient evidence of plaintiff's lack of due care to justify the district court's contributory negligence instruction.[1] The railroad alleges that the jack was available for installing the pan, but the plaintiff chose not to use it. Additionally, the railroad contends that the plaintiff could have requested additional employees to help carry the pan if he thought

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[1]The district court's instructions regarding contributory negligence were as follows:

INSTRUCTION NO. 12

In addition to denying that any negligence of the defendant caused any injury or damage to the plaintiff with respect to each of plaintiff's causes of action, the defendant alleges, as a further defense, that some contributory negligence on the part of plaintiff himself was a cause of any injuries and consequent damages plaintiff may have sustained.

it was dangerous. Thus, the defendant argues that because the decision to lift the pan without the jack or additional help was a matter of employee choice, it was error to in-

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Contributory negligence is fault on the part of a person injured, which cooperates in some degree with the negligence of another, and so helps to bring about the injury. In the present case, with respect to plaintiff's first cause of action, the defendant alleges that the plaintiff, Wayne Wilson, was guilty of contributory negligence in one or more of the following particulars:

1) In failing to exercise reasonable care and precaution for his own safety and well-being;

2) In failing to request any additional physical help necessary in the performance of plaintiff's assigned duties.

With respect to the plaintiff's second cause of action, the defendant alleges that the plaintiff was guilty of contributory negligence in one or more of the following particulars:

1) In failing to exercise reasonable care and precaution for his own safety and well-being;

2) In failing to obey instructions not to do heavy lifting or assume any positions which would reinjure his back when he had reason to believe it was beyond his physical capabilities.

By the defense of contributory negligence, the defendant in effect alleges that even if the defendant may have been guilty of some negligent act or omission which was one of the causes, the plaintiff himself, by his own failure to use ordinary care under the circumstances for his own safety, at the time and place in question, also contributed one of the causes of any injuries and damages plaintiff may have suffered.

The burden is on a defendant, alleging the defense of contributory negligence to establish, by a preponderance of the evidence in the case, the claim that the plaintiff himself was also at fault in one or more of the claimed particulars, and that such fault contributed one of the causes of any injuries and consequent damages plaintiff may have sustained.

You may not find contributory negligence on the part of the plaintiff however, simply because he acceded to the request or direction of the responsible representatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions.

INSTRUCTION NO. 13

Section 3 of the Federal Employers' Liability Act, 45 U.S.C.A. § 53 provides in part that:

In all actions . . . brought against any . . . common carrier by railroad . . . to recover damages for personal injuries to any employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

struct the jury regarding contributory negligence. Furthermore, the railroad argues that Wilson was also contributorily negligent on February 28, 1978, in failing to obey the doctor's restrictions on his work activity. We disagree.

The railroad's argument simply is not consistent with the realities of the workplace. Wilson was asked to help carry the pan. As was the custom at the Burlington Northern, he complied with the request. When a man's assistance is needed and asked for, he helps—there is no choice involved.

Moreover, the argument that Wilson could have used the jack is implausible. At the time of the injury, the pans were always installed manually; no one had used the jack for over a year.[2] In addition, the other three men installing the pan were present and ready to begin carrying it over to the car. Finally, there were railroad cars bunched around the particular car on which the men were working. These cars would have had to be moved in order to use the jack.[3] Obviously, in this situation, Wilson could not reasonably have been expected to decline to carry the pan and to ask that the jack be used instead.

So, if you should find, from a preponderance of the evidence in the case, that the defendant was guilty of negligence which caused, in whole or in part, any injury or damage to the plaintiff, and should you further find, from a preponderance of the evidence in the case, that the plaintiff himself was guilty of contributory negligence which contributed toward bringing about all or part of his injury, then the total award of damages to the plaintiff must be reduced by an amount equal to the percentage of fault or contributory negligence chargeable to the plaintiff.

[2]There is conflicting testimony on whether the defendant ordered the use of the jack terminated. Our decision, however, does not rest on this fact. Regardless of who ordered the use of the jack discontinued, it is undisputed that in February, 1978, the jack was not being used by employees and that the railroad was aware of this fact.

[3]The use of the jack requires a substantial amount of clear track at each end of the hopper car. When the use of the jack was discontinued, railroad cars were bunched together in a fashion that made the use of the jack impracticable unless cars were moved.

Similarly, there is no evidence that the pans were ever carried by more than four men. Thus, Wilson could not reasonably have been expected to ask that men be pulled off other jobs to help carry the pan when four men were already available.

Under the circumstances present here, Wilson's decision to help carry the pan was not a matter of free choice nor was it in any way unreasonable. He was simply doing his job and assisting other employees in need of help— as the railroad fully expected him to do.

Similarly, Wilson did not fail to exercise due care when he was reinjured on February 28, 1978. The railroad's doctor had certified that Wilson was ready to begin working again on February 22. Moreover, the doctor's instructions regarding restricting work activity apparently were nothing more than a perfunctory caution to avoid heavy lifting or assuming other positions that could reinjure Wilson's back and leg.[4] Apparently, the doctor placed no specific restrictions on Wilson's work activity. Under these circumstances, it was hardly a contravention of the doctor's work restrictions—if they can be considered restrictions at all—for a railroad worker who regularly engages in vigorous manual labor to step under a car and hammer a piece of equipment back into place.

Therefore, since there was no evidence that Wilson's own negligence contributed to either of his injuries, the district court erred by permitting the jury to consider the issue. *Paluch v. Erie Lackawanna Railroad Co., supra,*

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[4]The exact language of the physician's cautionary instructions do not appear in the record. The railroad does not point to any evidence that shows that the doctor's restrictions were anything more than an oral caution to avoid heavy lifting as Wilson asserts in his brief.

387 F. 2d at 999; *Morran v. Pennsylvania Railroad Co., supra,* 321 F. 2d at 403.

The defendant next argues that even if there was no evidence of contributory negligence, the district court's instruction was harmless error. Once again we disagree.

Under F.E.L.A., contributory negligence is not a complete bar to recovery; it may be used only to diminish damages. 45 U.S.C. §53. The amount of an employee's damages is reduced in proportion to the amount of negligence attributable to the employee—regardless of the extent of the plaintiff's contributory negligence. 45 U.S.C. §53; Woods, *The Negligence Case: Comparative Fault,* at 77 (1978).[5]

Relying on *Rogers v. Southern Pacific Co.,* 172 Cal. App. 2d 493, 342 P. 2d 258, 260 (1959), Burlington Northern argues that even if the district court erred in giving a contributory negligence instruction, F.E.L.A.'s pure comparative negligence scheme renders the error harmless here because the jury found that the plaintiff was not entitled to any damages. The *Rogers* court reasoned that because F.E.L.A. utilizes a pure comparative negligence scheme.

> [i]n order to find its verdict for defendant under these instructions the jury must have found that defendant was guilty of no negligence which contributed as a proximate cause to decedent's death. Under such circumstances any error in the instructions or the admission of evidence relating solely to the decedent's

[5]F.E.L.A. provides a federal comparative negligence scheme rather than relying on the standards of the states in which the injury occurred. 45 U. S. C. § 51; *New York Central Railroad Co. v. Winfield,* 244 U. S. 147, 149-152 (1917).

> contributory negligence cannot have been prejudicial to appellant.

Id.

There is some logic to the rule propounded by the *Rogers* court. This rule, however, ignores the practical realities that accompany the use of juries and general verdicts. Even with adequate instructions regarding the effect of contributory negligence under F.E.L.A., there is a risk that the jury may fail to understand the statutory comparative negligence scheme. And when, as here, a general verdict is used, a court cannot ascertain whether or not the jury correctly applied the applicable law in deciding to award no damages. Thus, we simply do not share the conviction of the *Rogers* court that because the jury awarded the plaintiff no damages. it *must* have found that the defendant was not guilty of any negligence which caused the plaintiff's injury.

We believe that the better rule is the one followed by the federal courts; that is, when there is no evidence from which a jury could reasonably find a lack of due care by the plaintiff, it is reversible error to submit the issue of contributory negligence to the jury. *E. g., Paluch v. Erie Lackawanna Railroad Co., supra,* 387 F. 2d at 999; *Morran v. Pennsylvania Railroad Co., supra,* 306 F. 2d at 403-404. In short, when there is no evidence from which a reasonable person could find an employee contributorily negligent, there simply is no reason to risk confusing the jury by giving such an instruction. Because of this risk of confusion, we cannot say that Wilson was not prejudiced by the unjustified contributory negligence instruction. Therefore. the error was not harmless.

The plaintiff also assigns as error numerous other acts

of the district court. Because of our disposition of the contributory negligence issue, we need not reach these contentions. Moreover, because of the importance of the contributory negligence question to the disposition of this case, a new trial is necessary on all issues. Therefore, we reverse and remand this matter for a new trial consistent with our opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 81-1429

September Term, 1981

Wayne T. Wilson,

Appellant,

vs.

Burlington Northern, Inc., a corporation,

Appellee.

Appeal from the United States District Court
for the District of South Dakota

The Court, having considered petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judge Ross did not take part in the consideration of the petition for rehearing.

March 26, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 79-0-372

Wayne T. Wilson,

Plaintiff,

vs.

Burlington Northern, Inc.,

Defendant.

JUDGMENT

(Filed January 14, 1981)

This action came on for trial before the Court and a jury, Honorable Albert G. Schatz, Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict;

IT IS ORDERED AND ADJUDGED that the Plaintiff take nothing; that the action is dismissed on the merits with prejudice; and that the defendant, Burlington Northern, Inc., recover of the Plaintiff, Wayne T. Wilson, taxable costs of this action.

Dated at Omaha, Nebraska, this 14th day of January, 1981.

WILLIAM L. OLSON
Clerk of the Court
By /s/ Barbara Campbell
Barbara Campbell
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 79-0-372

Wayne T. Wilson,

Plaintiff,

vs.

Burlington Northern, Inc.,

Defendant.

ORDER

(Filed March 16, 1981)

This matter coming on for hearing and determination with reference to plaintiff's motion for a new trial (Filing No. 24), and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that plaintiff's said motion be and the same is hereby denied.

BY THE COURT:

/s/ Albert G. Schatz
Judge, United States District Court

INSTRUCTION NO. 13

Section 3 of the Federal Employers' Liability Act, 45 U.S.C.A. §53, provides in part that:

> In all actions . . . brought against any . . . common carrier by railroad . . . to recover damages for personal injuries to any employee . . . the fact that the employee may have been gulity of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

So, if you should find, from a preponderance of the evidence in the case, that the defendant was gulity of negligence which caused, in whole or in part, any injury or damage to the plaintiff, and should you further find, from a preponderance of the evidence in the case, that the plaintiff himself was guilty of contributory negligence which contributed toward bringing about all or part of his own injury, then the total award of damages to the plaintiff must be reduced by an amount equal to the precentage of fault or contributory negligence chargeable to the plaintiff.

INSTRUCTION NO. 20

In connection with each of plaintiff's causes of action, the issues to be determined by the jury in this matter are: First. was the defendant negligent in one or more of the particulars alleged in connection with this claim?

If your unanimous answer to this question is "no," you will return a verdict for the defendant on that cause of action; but if your unanimous answer is "yes," you will then have a second issue to determine, namely: Second, did the

negligence of the defendant cause or contribute to the claimed injury and damage to the plaintiff?

If your unanimous answer to this question is "no," you will return a verdict for the defendant on that cause of action; but if your unanimous answer is "yes," you must then find the answer to a third question, namely: Third, was the plaintiff guilty of some contributory negligence in connection with this claim?

If you should find that he was not, then, having found in plaintiff's favor in answer to the first two questions, you will proceed to determine the amount of plaintiff's damages for that claim, and return a verdict on that claim in plaintiff's favor in the amount.

On the other hand, if you should find from a preponderance of the evidence in the case, that plaintiff himself was guilty of contributory negligence, and that plaintiff's fault caused or contributed to any injuries which plaintiff sustained, then you must diminish any damages for this claim in proportion to the amount of negligence attributable to the plaintiff.

You are again reminded that you must determine each of the foregoing issues separately for each of plaintiff's causes of action. You must not permit the determination of any of these issues on the first cause of action to affect the decision on plaintiff's second cause of action.

END OF DOCKET